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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 766

In the Matter of the Petition of
NATIONAL AIRLINES, INC.

NORTHEAST AIRLINES, INC.
v.
CIVIL AERONAUTICS BOARD

PETITION OF NATIONAL AIRLINES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Washington, D. C.
January 15, 1964

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PETITION OF NATIONAL AIRLINES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, National Airlines, Inc., (hereinafter referred to as National) prays that this Court issue a Writ of Certiorari to review orders of the United States Court of Appeals for the First Circuit entered on October 17 and November 6, 1963 insofar as said orders denied National's motion for leave to intervene in a proceeding for judicial review of an order of the Civil Aeronautics Board, said proceeding being entitled *Northeast Airlines, Inc. v. Civil Aeronautics Board*, No. 6220.[1]

[1] Eastern Air Lines, Inc. is also seeking the issuance of a writ from this Court (No. 720). The issues raised in Eastern's petition encompass the issue raised here and the record is the same. Accordingly, National is not filing a separate certified copy of the record in addition to that already filed by Eastern.

OPINIONS BELOW

The orders of the United States Court of Appeals for the First Circuit were entered without opinion. They are reproduced and attached as Appendix A hereto.

JURISDICTION TO REVIEW

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

This petition is timely filed since the orders complained of herein were entered on October 17, 1963 and November 6, 1963 respectively.

The power of this Court to review the orders complained of herein upon petition of one who claims denial of intervention as of right is sustained by *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, 20 (1954), and by *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947).

QUESTION PRESENTED

Whether an air carrier which participates actively as a full intervenor in the development of the evidentiary record in a Civil Aeronautics Board route case and which has a substantial financial interest in supporting the orders of the Board entered upon the evidentiary record in said route case is entitled to intervene as a party respondent in support of said orders in a proceeding for judicial review brought by a direct competitor for the purpose of setting aside said orders.

STATUTES INVOLVED

None.

STATEMENT

Towards the end of 1956, the Civil Aeronautics Board (the Board) after a proceeding known as the *New York-Florida Case*, 24 CAB 94 (1956) issued a certificate to Northeast Airlines, Inc. (Northeast) authorizing the car-

rier to engage in air transportation of persons, property and mail beyond its then southernmost terminal point at New York to Miami, Florida via Philadelphia, Baltimore, Washington, Jacksonville, Tampa and St. Petersburg. Northeast was thus authorized to compete directly with National and with Eastern Air Lines. The duration of the authority thus conferred was five years and, by its terms, the certificate issued to Northeast expired on November 27, 1961. Thereafter, however, Northeast continued to operate under a claim that its authority to do so was preserved by the provisions of Section 9 (b) of the Administrative Procedure Act, 5 U.S.C. Section 1008 (b).

In April 1961 Northeast filed an application for the renewal of its temporary authority. The application was put down for hearing along with other competing applications, and was heard in a proceeding known as the *New York-Florida Renewal Case*, CAB Docket No. 12285 *et al.* That case lasted more than two years and the record in the proceeding consists of about 11,000 pages. On the basis of the record created by the parties (including, to a large extent, the intervenor, National Airlines) the Board concluded that the public convenience and necessity did not require the operations of a third carrier in the markets covered by Northeast's application. Accordingly, it denied Northeast's application for renewal as well as all competing applications. (CAB Order No. E-19910, August 15, 1963).

In due course petitions for reconsideration were filed by Northeast together with petitions from certain civic parties supporting that carrier. In its petition for reconsideration, Northeast requested that the Board stay the effective date of its decision pending judicial review. On October 8, 1963, by Order No. E-20073 the Board affirmed its prior order, denied the petition for reconsideration and the motion for stay but purportedly extended the effective date of Order No. E-19910 from October 14, 1963 to November 15, 1963 for the purpose of permitting Northeast additional time

to achieve an orderly termination of operations south of New York.

On October 4, 1963 Northeast filed a petition for judicial review by the Court of Appeals for the First Circuit of Civil Aeronautics Board Order No. E-19910. Northeast also filed a motion for stay of the Board's order *pendente lite* and in any event until April 30, 1964.

On October 9, 1963 National filed a motion for leave to intervene, together with a motion for leave to file and memorandum in opposition to the motion for stay. On the same day Northeast opposed National's petition for leave to intervene. Thereafter, on October 17, the Court entered its order denying National's motions.

On October 24, 1963, National sought reconsideration of the lower Court's order insofar as it had denied National intervention in the proceeding. But, on November 6, 1963, the Court entered an order denying the motion for reconsideration but granting leave to file a brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT

The question whether a party which has prevailed before an administrative tribunal should be permitted to intervene as a party respondent in a subsequent proceeding for judicial review is an important matter which warrants a disposition by this Court. For at the end of most administrative hearings there are some parties who are aggrieved and there are some who are gratified by the final order of the agency involved. A party aggrieved may pursue his remedy further. But, if the ruling of the Court below is correct, a party which has successfully advocated the merits of its case to the agency must sit back and allow that agency to defend not only its own actions but the property and financial interests of the successful litigant as well. If the agency should be unable or unwilling ade-

quately to represent those interests, then the party which had been successful at the administrative level may well be deprived of its right of appeal to this Court and of its opportunity to demonstrate that the agency was, after all, correct in the first instance.

In National's submission the manifest injustice of the action below requires correction by this Court. But whether that action was correct or erroneous, the question is one which is of general importance in the field of administrative law. It is one which deserves decision by this Court.

Apart from the importance of the issue it raises, the decision of the Court of Appeals for the First Circuit appears to be in conflict with criteria established by Rule 24(a) of the Federal Rules of Civil Procedure, the opinions of this Court and the opinions and or practice of others of the United States Courts of Appeals.

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides that—

> "Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by the judgment in the action."

The foregoing rule has been applied by Circuit Courts as a guide to intervention at the appellate level. Interestingly enough, the First Circuit so uses it. *Algonquin Gas Transmission Co.* v. *FPC*, 201 F. 2d 334 (1 Cir. 1953).

The Rule states that a person shall be allowed to intervene where his interests may not adequately be represented by others. The present parties to the proceeding below are Northeast and the Board. Clearly the former is not about to represent National's interests. And the Board is in the peculiar position of being, for review purposes, "in harness" with the Department of Justice which has publicly

taken the position that the Board's conclusions in the case were wrong. It is an understatement to say that, on the basis of those facts, National's interests may not adequately be represented. Particularly is this true if, for some reason, the First Circuit, should decide to remand the case to the Board. For in that event, and with existing parties, who would seek review by this Court? Certainly not Northeast. Nor is it likely to be the Solicitor General's office of the Department of Justice—the same Department which thinks the Board is wrong. In short, the strong likelihood is that National would be denied review by this Court in the event the First Circuit disagrees with the Board's actions. That is enough to warrant corrective action by this Court.[2]

It is also apparent that National will be bound by any order made in the proceeding below. This does not have to reach the point of being bound in a *res judicata* sense.[3] It is sufficient for the purpose of intervention that National will be bound because of the "practical necessities" of the situation. *International Brotherhood of Trainmen* v. *Baltimore & Ohio Rr. Co., supra*, at page 524. Thus, if Northeast should prevail before the Court below, National will be required to retry and reargue its case—a lengthy process, during which National will be deprived of many millions of transport revenue dollars which would otherwise accrue to it. Indeed, National is even now bound in a practical sense by the action of the Court below in granting a staying of the effective date of the Board's order.

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[2] "And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom." *International Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Rr. Co.*, 331 U.S. S 19, 531 (1947). See also *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D.C. Cir., 1944), *cert. denied* 323 U.S. 777, (1944).

[3] The actions of the First Circuit would not be *res judicata* as to a mere *amicus curiae*.

The result of that stay—the propriety of which National does not concede—has been a continuation of competition found by the Board to be uneconomic with resultant irretrievable financial loss to National. (See *Textile Workers Union of America* v. *Allendale Co.*, 226 F. 2d 765, 767-768 (D.C. Cir. 1955)).

The fact that National's interest in the outcome of the case in the Court below is a private one is not a valid ground for the denial of intervention.[4] To be sure, the primary interest to be safeguarded is the "public interest" and the Board is the representative of that interest. But the fact of the matter is that National's interest is a part of the public interest just as is Northeast's. And National should be permitted to protect its own interest just as Northeast is allowed. This Court, under fairly similar circumstances, has so held. Thus, in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, this Court stated:

> "Plainly enough, the circumstances under which interested *outsiders* should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. But where the enforcement of a public law also demands distinct *safeguarding of private interests* by giving them a formal status in the decree, *the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion*". (312 U.S. at 506; emphasis added).

Finally the action of the court below is inconsistent with the practice of all other circuits in which review of Board orders has been sought. While there is no reported litigation of the issue, no circuit, so far as National knows, has declined to permit intervention by an air carrier as a

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[4] It is probable that the Court below denied intervention in the light of *Amalgamated Meat Cutters* v. *N.L.R.B.*, 267 F. 2d 169 (1 Cir., 1959).

party respondent in a proceeding to review an order of the Civil Aeronautics Board when such air carrier has participated in the proceeding before the agency. Indeed, Northeast itself has been the beneficiary of such practice in the United States Court of Appeals for the District of Columbia Circuit,—the Circuit which most frequently reviews orders of the Board: *National Airlines* v. *CAB*, 321 F. 2d 389 (D.C. Cir., 1963); *National Airlines* v. *CAB*, 306 F. 2d 733 (D.C. Cir., 1962).

Whatever may be the validity of the *Meat Cutters* case, *supra*, in the context of an appeal arising out of the National Labor Relations Board—(which *alone* has power to enforce its own act)—it should have no applicability to proceedings arising from the Civil Aeronautics Board.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ JOHN W. CROSS
/s/ JOSEPH P. ROONEY
Attorneys for Petitioner,
National Airlines, Inc.

Certificate of Service

I, John W. Cross, one of the attorneys for National Airlines, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of January 1964, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit (and Appendices thereto) by mailing copies thereof, correctly addressed and with first class postage prepaid to the following, as required by Supreme Court Rule 33:

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/s/ John W. Cross
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January 15, 1964

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6220

NORTHEAST AIRLINES, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

ORDER OF COURT

October 17, 1963

Upon consideration of (1) motion of Eastern Air Lines, Inc., for leave to intervene, (2) motion of Master Executive Council for Northeast Pilots for leave to intervene, (3) motion of Master Executive Council for leave to file memorandum and affidavit in support of motion of petitioner for stay, and the proffered memorandum and affidavit, (4) motion of International Association of Machinists for leave to intervene, (5) motion of International Association of Machinists for leave to file memorandum and affidavit in support of motion of petitioner for stay, and the proffered memorandum and affidavit, (6) motion of Eastern Air Lines, Inc., for leave to oppose motion of petitioner for stay, and the proffered memorandum and affidavit, (7) motion of National Airlines, Inc., for leave to intervene, (8) motion of National Airlines, Inc., for leave to file memorandum in opposition to the motion for stay and the proffered memorandum and affidavit, (9) petitioner's memorandum in opposition to the motions to intervene of Eastern Air Lines, Inc., and National Airlines, Inc., (10) motion of petitioner for leave to file reply to answer by respondent to motion for stay, and the proffered reply, (11) motion of National Airlines, Inc., for leave to file answer to petitioner's motion for leave to file a reply, and the proffered answer, and (12) motion of Eastern Air Lines, Inc., for leave to file memorandum in opposition to motion of petitioner for leave to file reply, and the proffered memorandum,

It is ordered that the aforesaid motions for leave to intervene generally be, at this stage; and the same hereby are, denied; and further

It is ordered that the remainder of the aforesaid motions be, and the same hereby are, denied.

By the Court:

/s/ Roger A. Stinchfield
Clerk

[cc: Messrs. Fordham, Wanner, Wait, Rooney and Hanify.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6220

Northeast Airlines, Inc., *Petitioner*,

v.

Civil Aeronautics Board, *Respondent*.

Order of Court.

November 6, 1963

Upon consideration of motions of National Airlines, Inc., and Eastern Air Lines, Inc., for reconsideration of the order of this Court of October 17, 1963, denying leave to intervene, and of memorandum in support thereof and in opposition thereto, and

Treating said motions as alternatively seeking leave to file briefs amici curiae,

Leave is hereby granted to said movants herein to file briefs amici curiae pursuant to Rule 23(10) of the Rules of this Court, and the motions are otherwise denied.

By the Court:

/s/ Roger A. Stinchfield
Clerk

[cc: Messrs. Fordham, Wanner, Rooney and Wait.]

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CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MEMORANDUM FOR NORTHEAST AIRLINES, INC., IN OPPOSITION

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February 4, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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IN THE MATTER OF THE
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MEMORANDUM FOR NORTHEAST AIRLINES, INC., IN OPPOSITION

By the instant petition, National Airlines, Inc. ("National") joins Eastern Airlines, Inc. ("Eastern") in seeking review of the orders below which limited Eastern and National to participation as *amici curiae* in the review proceedings. National's petition

does not present any points for this Court's consideration of the intervention issue which are not raised in Eastern's petition, No. 720.* Accordingly, Northeast Airlines, Inc. ("Northeast") respectfully refers the Court generally to its brief in opposition to the Eastern petition for the statement of the case and the reasons why the instant petition should be denied. We only wish to point out, in addition, that the three cases on which National places principal reliance convincingly illustrate the lack of merit in National's claim that it should have been allowed to intervene below:

(a) In urging that it will be "bound" by the First Circuit's eventual decision on the merits, National relies on two words—"practical necessities"—from *International Brotherhood of Trainmen* v. *Baltimore & O. R. Co.*, 331 U.S. 519, 524 (1947). Intervention was granted in that case solely under Rule 24(a)(1) of the Federal Rules of Civil Procedure—"when a statute of the United States confers an unconditional right to intervene."** Rule 24(a)(2), to which National attempts to draw an analogy, was not relied upon by the Court in deciding that case.

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* National does not join Eastern in requesting this Court to review the grant of the stay.

Like Eastern, National does not advise this Court of their unsuccessful action in Florida under § 1007 of the Federal Aviation Act in which they tried to enjoin the operations of Northeast to Florida on the theory that the stay granted below was invalid—a position which is, of course, inconsistent with their arguments here that they are "bound" by the proceedings below.

** The statute granting intervention in that case was Section 17(11) of the Interstate Commerce Act, 49 U.S.C. § 17(11). National does not dispute the obvious fact that no section of the Federal Aviation Act grants a right to intervene in review proceedings of CAB orders.

(b) National argues that *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 (1941), gives it a right under Rule 24(a)(2) to intervene. Even were Rule 24(a)(2) applicable (but see Northeast's Opposition in No. 720, pp. 10-11), *Missouri-Kansas* is inapposite. As this Court there stated, the "foundation" of the intervention rights recognized in that case was laid in the provisions of an antitrust consent decree specifically reserving certain rights to the applicant for intervention and specifically permitting it to become a party—"Rule 24(a) does not touch our problem." *Id.* at 506 and 508.

(c) National relies on *Algonquin Gas Transmission Co.* v. *Federal Power Comm'n*, 201 F.2d 334 (1st Cir. 1953), in attempting to construct a "right" to intervene. But that case *explicitly* stated that intervention, in a similar judicial review proceeding of an administrative order, was a matter for the reviewing court's *discretion*. And National does not attempt to claim—nor could it sensibly do so—that under the factual circumstances the First Circuit abused this discretion in limiting National to participation as *amicus*.

Accordingly, and for the reasons set forth fully in Northeast's Brief in Opposition in No. 720, the petition should be denied.

Respectfully submitted,

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